Before the
FederalCommunications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity Video Programming Distribution and Carriage	)	

To: The Commission

COMMENTS OF Charles H. "Charlie" Stogner, President, LAPA

These comments are submitted on behalf of Charles Stogner, in his role as President of the Leased Access Programmers Association ("LAPA"). LAPA serves as a national trade association to promote the interests of video producers using, or wanting to use, leased access cable TV for the distribution of their programming. Voting membership is open to all persons who use or want to use leased access and associate membership is available to equipment suppliers, attorneys, government officials, cable companies and other persons/entities who do business with or have an interest in leased access video production. Our goal is to promote the use of leased access cable TV, encourage and work with the FCC to develop specific rules and regulations concerning the obligations cable TV companies have in carrying out the mandate of Congress to provide a 'genuine outlet' for leased access programming to promote choice, diversity and competition which is beneficial to the public interest. LAPA also

attempts to work with the cable companies to resolve problems that arise from programmers exercising the right to leased access as mandated by Congress.

COMMENTS ON THE REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: November 27, 2007 Released: February 1, 2008

Although it is obvious LAPers (leased access programmers) only exist due to Congress' desire to create 'genuine outlets' for programming unaffiliated with the cable operator, it is difficult to understand how rules governing our operations can be promulgated without extensive discussions with those of us that survive adverse conditions. Our association wants to thank FCC Chairman Martin and the other Commissioners for the proactive measures adopted on November 27, 2007.

In commenting on the Report released Feb.1, 2008, we start with paragraph five (5), where it states." Congress also required that the Commission's rules not adversely affect the operation, financial condition, or market development of the cable system." Even a cursory review of the Petitions for Relief filed on leased access issues since the release of the Second Report and Order, Jan. 1997, makes it appear the FCC staff took the part that says "financial condition" to heart and time after time issued orders that seem much more concerned with

insuring the cable operator is not bothered by the decision than being any sensible solution.

We may address one or more examples later in these comments, but for starters it is interesting to note that time after time FCC refused to impose any financial penalty on a cable operator no matter how bad or flagrant was the action involved in the petition. The official comment was always along the lines of *"Neither the Communications Act of 1934, as amended, the 1984 Act, nor the 1992 Act provide for recovery of costs associated with the filing of a petition for relief with the Commission for alleged violations of the leased access statutory provisions or of the Commission's regulations issued under authority of those statutory provisions."* Thankfully in the Feb.1 report there is this rule: *"Although the Commission's forfeiture guidelines establish a baseline forfeiture of $7,500.00 per day for violation of the leased access rules, we find at this time that a $500.00 per day penalty should be adequate to encourage prompt compliance with the customer services obligations."*

Although it now appears FCC will perhaps impose a minor penalty on cable operators violating rules, it seems the only rule they may enforce will involve 'prompt compliance'. This doesn't say non-compliance with any rule but seems to infer only in providing the information on time. Hopefully FCC will clarify this and perhaps make it understood the penalty will apply to any and all

violations. There have been petitions where had FCC done any due diligence in determining the facts in the petition they would have had clear evidence where cable sites caused financial harm to LAPers (leased access programmers) with impunity. It doesn't seem the FCC staff ever considered the "financial condition" of the injured LAPer.

At paragraph seven (7), we find, *"In addition, cable operators may impose reasonable insurance requirements and must provide the minimal level of technical support necessary for users to present their material on cable systems."* A careful reading of FCC materials will reveal that while the Commission declines to identify what are 'reasonable insurance requirements' the only specific type policy they have stated can be required is 'media perils'. It seems this came about after 1992 when the issue of 'lewd or obscene' material entered the leased access arena and FCC agrees with cable operators they need the LAPer to provide this type coverage with the cable site as 'additional insured' in the event legal action regarding this type content is ever brought against a cable site due to it occurring in a LAPer's show. There is no record of such action ever occurring; the 'adhesion contracts' paraded as 'agreements' by the cable companies include clauses banning LAPers from airing content containing 'lewd or obscene' content and if this ever occurs this would be a 'breach of contract' of this legal document and the cable site could go after the LAPer's insurance. FCC should perhaps allow cable operators to require 'proof

of insurance' covering 'breach of contract' but not require the LAPer make the cable site 'additional insured' on any policy. It is interesting to note that regarding other types of insurance policies FCC has stated: "W*e note that cable operators have been given protection from leased access program liability as provided by Section 638 of the Communications Act. Section 638 provides program liability protection "unless the program involves obscene material." We are not aware, however, of any statutory provision that completely protects cable operators from all possible program carriage liability, or from the filing of un-meritorious actions against cable operators despite the provisions of Section 638. Moreover, the Commission does not deny cable operators the right to request indemnification from leased access programmers for the costs and expenses attributable to defending a prosecution for carriage of an allegedly obscene program, stating, "this is a reasonable term or condition relating to use of leased access channel capacity in light of the removal by Congress in amended Section 638 of cable operator immunity for carriage of obscene programming."* In yet another ruling FCC stated; "*the general liability matters for which CSC demands insurance coverage from Petitioners appear substantially no different from those confronted by any business enterprise that interfaces with the public. Accordingly, we find that (cable's) requirement that Petitioners provide what amounts to re-insurance coverage for matters normally covered by its own insurance policies to be unreasonable..."*

The part stating, "*must provide the minimal level of technical support necessary"* is a broad area that begs for much more detail. In fact a review of leased access petitions reveals rulings that fly in the face of this. There are far too many occasions where LAPers have been forced to purchase expensive equipment, modulators, etc. that cable operators provide for all their non-leased programmers. There have been insidious rulings where cable has been allowed to charge LAPers for time involved in converting content and/or putting it on a master tape, purely for the convenience of the operator. We find no evidence where FCC ever commenting in these petition orders that cable operators be required to provide LAPers information on alternative means of having programming inserted in the designated channel.

It appears FCC considered today's development of IPTV technology in the delivery of video signals. At paragraph nine (9) the report says; *The Commission sought comment on the rate formula for leased access channels; whether the development of digital signal processing and signal compression technologies require changes in the formula; 17 whether changes in technology require flexibility in the delivery format; whether the rules should allow more flexibility in tier and channel location; whether leased access should apply to video-on-demand ("VOD") or other technologies; and whether any advances in technology or marketplace developments affect the leased access rules, such as interactive electronic programming guides and addressable digital set-top boxes.*

Although there seems to be no clear indication FCC will require cable operators to permit leased access signals be delivered via the internet, thankfully the new rule at item nine (9) under "Customer Service Standards" requires cable operators to provide-- "*The available methods of programming delivery and the instructions, technical requirements and costs for each method."* When this is considered with the statement in paragraph two (2) in the opening introduction to the Feb.1, report where it states, (we). "*adopt customer service obligations that require minimal standards and equal treatment of leased access programmers with other programmers*, it cries for a more detailed explanation of what this means. It has already become necessary for StogMedia to file a petition for relief involving charges for our use of internet service to deliver our programming signal to Cable One when they admit they provide not only free reception to all non-leased programmers but provide and install any necessary equipment at Cable One's expense. StogMedia is being denied even paying for broadband service by WEHCO based on their apparent assumption we will use too much bandwidth, yet never first testing this. The IPTV format with MPEG4 compression permits StogMedia to require very low bandwidths for signal delivery. There are new digital devices anticipated to be available by July that reduce the necessary bandwidth for delivery of TV quality, even HD, signals at bandwidths well below 1.0. FCC should create rules regarding technical matters to at least the level of those created in the CLEC/ILEC arena where there should be no dispute between cable and LAPers as to what is required.

At paragraph sixteen (16) *Geographic Levels of Service that Are Technically Possible.* We find this language: *We will not require, at this time, the operator to allow the*

leased access programmer to serve discrete communities smaller than the area served by a headend if they are not doing the same with other programmers. FCC needs to more clearly define what is meant by this. A later sentence says, we *will require cable system operators to clearly set out in their responses to programmers what geographic and subscriber levels of service they offer.* This first sentence seems to imply cable operators will be required to permit leased access programmers channels on 'discrete communities' if they offer a channel on this system to any other programmer. When this statement is considered along with item two (2) of Section **76.972 Customer service standards** that requires cable operators to provide information on *The geographic and subscriber levels of service that are technically possible,* this should mean if the site has a PEG channel, this is clear evidence the technology exists to permit other 'site specific' channels. It's ironic that while cable companies are eradicating localism at the basic franchise area, FCC is seeking comments on promoting localism by broadcasters. The area of service to 'discrete communities' can offer true 'localism'.

Paragraph seventeen (17) addresses: *Number, Location, and Time Periods Available for Each Leased Access Channel*. In this paragraph we find the statement: *Our current leased access channel placement standards provide that programmers be given access to tiers that have subscriber penetration of more than 50 percent.* Missing was reference to the actual section that reads: *Cable operators shall place leased access programmers that request access to a tier actually used by most subscribers on*

any tier that has a subscriber penetration of more than 50 percent, unless there are technical or other compelling reasons for denying access to such tiers.

It cannot be over emphasized that the timing of the release by FCC's Media Bureau on the petition allowing Cox cable to place leased access programming on a 'premium' (digital) channel at New Orleans while continuing their own 'local origination' channels on the basic tier is questionable. It simply cannot be coincidence the ruling on this petition filed March 7, 2007 was not released until after the new rules adopted Nov. 27. 2007 were released Feb. 1, 2008. It is glaringly suspicious that the staff did not release this rule until after the time for comments and the Commission had acted and released the report since had it been released in a timely manner weeks after the discovery period, this could have been brought to the attention of the Commissioners while they were contemplating new rules.

It's not hard to find plenty evidence the true intent of Sec.76.971 Commercial leased access terms and conditions that reads, *(a) (1) Cable operators shall place leased access programmers that request access to a tier actually used by most subscribers on any tier that has a subscriber penetration of more than 50 percent, unless there are technical or other compelling reasons for denying access to such tiers,* (Underlined for emphasis.) actually means leased access is to be on a tier 'actually used by most subscribers'.

In the Second Report and Order of 1997, the following two paragraphs address tier placement. Paragraph 83 states: According *to the legislative history of the 1992 amendments to Section 612, the purpose of leased access would be defeated if leased access programmers were placed on tiers that few subscribers access. The 1992 Report states that "[t]he FCC should ensure that [leased access] programmers are carried on channel locations that most subscribers actually use." It further states "it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers."*

Paragraph 84 continues, *"In the Further Notice, the Commission tentatively concluded that leased access programmers are entitled to placement either on the BST or on the CPST with the highest subscriber penetration, unless technical or other compelling reasons weigh against such placement. We reasoned that the BST and the CPST with the highest subscriber penetration qualify as "genuine outlets" because "most subscribers actually use" them."*

As further evidence the Commissioners would have 'more than likely' reaffirmed this phrase actually used by most subscribers" when they created the new rules, we can look to slide 6 at

http://www.fcc.gov/commissioners/martin/documents/DOC-251635-slides.pdf,

where FCC chairman Martin's presentation states*: "Cable Programming Tiers"; Basic Tier: Broadcast channels, public, educational and government channels, and leased access channels; typically 10-12 channels.*

There is additional evidence that shows Congress must have intended for leased access to be on channels used by most subscribers, not simply channels with more than 50 percent. In fact the U.S. District Court of Appeals, in the case of ValueVision vs. FCC, stated, *"The Commission also made a number of changes to the terms and conditions of leased access favoring leased access programmers. Such programmers were given the right to demand access to a tier with more than 50 percent subscriber penetration, see id. at 5290, thus preventing operators from relegating leased access to the least watched tiers.*

It is inconceivable the Media Bureau could not note Cox, New Orleans, placement of leased access on a premium (digital) tier with an estimated 97,000 subs is certainly more of a 'least watched tier' than the analog channels with some 163,000 subs where Cox places their local origination channels.

The courts have further ruled on advertising as commercial speech and the very basis of the leased access law is founded in cable operators being prevented from imposing editorial restraints on leased access. How can it not be that placing leased access commercial content on a channel with little more than 50 percent of the viewers enjoyed by Cox on analog is an attempt to restrict the programming from being on a 'level playing field' for advertising?

So, in closing let's review what has been done by emphasizing the issue of channel placement. Just when it appeared the FCC had finally created rules

that could provide leased access programmers with what Chairman Martin stated in his comments following their adoption such as, *"…we take steps to make it easier for independent programmers to reach local audiences."* And*, "I believe that the actions we take today will go a long way to accomplishing the twin goals of competition and diversity articulated in section 612 of the Act."* were literally wiped away by the actions of the Media Bureau on February 13.

Todd Spangler writing in Multichannel News, 1/18/2008, wrote, *"In fact, cable operators are moving to eliminate fat analog signals to "reclaim" bandwidth, so they can introduce new high-definition channels, offer faster Internet access and expand video-on-demand services."* What won't pass the 'smell test' is cable is eliminating PEG and leased access programming from analog, while retaining their own local origination channels.

Recently, during a hearing before Congressman Dingell on Comcast moving PEG channels to digital, when Congressman Dingell asked Mr. Cohen about the four Comcast channels still on analog in the Grand Rapids area. They are: **Comcast Information; Comcast Local; Comcast Marketplace; and Comcast Real Estate,** all of which are "local origination" channels with the same type programming as is produced by most leased access programmers.

The February 13 ruling by Steven A. Broeckaert, Deputy Chief, Policy Division, Media Bureau, in the Cox, New Orleans, petition, CSR-7133-L, where he ruled Cox was within the rules needs to be over turned. His order, placing leased

access on a digital tier with only 97,000 subscribers while keeping their own local origination channels on the basic, analog tier is not consistent with the rule governing channel placement (Sec.76.971; **Commercial leased access terms and conditions.***(a)(1) Cable operators shall place leased access programmers that request access to a tier* ***actually used by most subscribers*** *on any tier that has a subscriber penetration of more than 50 percent.)*

In the recent case, involving TCR Sports Broadcasting and Time Warner, arbitrator Jerome J. Sussman determined: *That Time Warner carries its own sports network on analog and that by placing TCR's sports network on a digital tier with far fewer subscribers would be, as he stated it, "the kind of discrimination that I think the FCC intended to prevent".*

Additionally the arbitrator listed as Additional Findings of Fact, that "TWC has both motive and opportunity to discriminate against TCR. The motive comes from comes from TWC's desire to protect and promote its own RSN-News 14 Carolina.

The similarities between this case and Cox, New Orleans where Cox continues to keep their local origination channel(s) on analog while putting leased access on digital are astonishing.

Hopefully, FCC will continue to review and revise leased access rules until the 'genuine outlet' Congress appears to want; and where leased access programming is, on channels 'actually used by most subscribers' is a reality.

In the 1996 First Order and Report, FCC stated *"the rules we adopt should be understood as a starting point that will need refinement both through the rulemaking process and as we address issues on a case-by-case basis."* LAPA fails to see where this has occurred if we look at the petitions for relief as the 'case-by-case' process. There is overwhelming evidence many petitions were not only handled in a very lackadaisical manner, some taking months to be ruled on, but that FCC never seemed to use these as basis for issuing revised rules. LAPA offers to review petitions with FCC staff to see where there are areas they could lead to development of better rules and/or at least guidelines.

Respectfully Submitted,

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